

Supreme Court, U. S.  
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In The

Supreme Court of the United States

October Term, 1977

No. 77-1699

MICHAEL R. DIEM,

*Petitioner,*

vs.

UNITED STATES OF AMERICA and ROBERT E. ROSS  
of the Internal Revenue Service,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

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## TABLE OF CONTENTS

	<i>Page</i>
Opinions Below .....	1
Jurisdiction .....	2
Questions Presented .....	2
Statutes Involved .....	2
Statement of the Case .....	3
Reasons For Granting the Writ .....	6
Conclusion .....	8

## TABLE OF CITATIONS

### Cases Cited:

United States v. LaSalle National Bank, Docket No. 77-365, 554 F.2d 302 (Mar. 29, 1978) .....	2, 5
United States v. Morgan Guaranty Trust Co., 77-6191, Feb. 6, 1978 .....	5, 6

### Statutes Cited:

26 U.S.C. §7402 .....	2
26 U.S.C. §7402(b) .....	5
26 U.S.C. §7602 .....	2, 3, 7
26 U.S.C. §7604 .....	2

Contents

	<i>Page</i>
26 U.S.C. §7604(2) .....	5
26 U.S.C. §7609 .....	2, 3
28 U.S.C. §1254(1) .....	2

**Rules Cited:**

New York Civil Practice Law & Rules, Sec. 3212(f) .....	7
Federal Rules of Civil Procedure, Sec. 56(f) .....	7

**APPENDIX**

I — Judgment of Court of Appeals Dated April 25, 1978..	1a
II — Order of Mr. Justice Marshall Staying Enforcement of Judgment of Court of Appeals May 5, 1978 .....	2a
III — Internal Revenue Code .....	3a
IV — Federal Rules of Civil Procedure .....	10a
V — New York Civil Practice Law and Rules .....	10a

In The

**Supreme Court of the United States**

October Term, 1977

No.

MICHAEL R. DIEM,

*Petitioner,*

vs.

UNITED STATES OF AMERICA and ROBERT E. ROSS, of  
the Internal Revenue Service,

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND  
CIRCUIT**

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, dated and entered in the above entitled case on April 25, 1978.

**OPINIONS BELOW**

The District Court did not write any opinion. The Court of Appeals summarily affirmed without opinion.

## JURISDICTION

The judgment of the Court of Appeals was dated and entered on April 25, 1978 (Appendix, *infra* at 1a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The enforcement of the judgment was stayed, pending the issuance of this Court's opinion in *United States v. La Salle National Bank*, Docket Number 77-365, argued on March 29, 1978, by order of Mr. Justice Marshall, dated May 5, 1978 (2a).

## QUESTIONS PRESENTED

1. May the Internal Revenue Service properly issue summonses to obtain third-party records in aid of administrative investigations conducted by the Internal Revenue Service to determine whether it recommend to the Justice Department that the taxpayer be prosecuted for criminal tax violations?

2. Did the District Court err in granting an order enforcing the Internal Revenue Service summonses without first granting the taxpayer an evidentiary hearing, and discovery in aid of that hearing, to determine whether the Internal Revenue Service summonses had been issued in bad faith for the improper purpose of a criminal investigation?

## STATUTES INVOLVED

26 U.S.C. §7402 confers jurisdiction on the District Courts of the United States to compel persons summoned under the Internal Revenue laws to produce books and records before the Internal Revenue Service.

26 U.S.C. §7602 authorizes the Secretary of the Treasury or his delegate, to direct the appearance of taxpayers and others before the Internal Revenue Service with books and records for the purpose (i) of ascertaining the correctness of any tax return; (ii) making a return where none has been made; (iii) determining

the liability of any person for any internal revenue tax or the liability of any transferee or fiduciary of any person in respect of any Internal Revenue tax; (iv) collecting any such liability.

26 U.S.C. §7604 confers jurisdiction on the United States District Courts to compel the attendance of third persons with books and records of a taxpayer.

26 U.S.C. §7609 sets forth a special procedure whereby a taxpayer may stay compliance by a third party served with a summons by the Internal Revenue Service requiring production before the Internal Revenue Service of the taxpayer's books and records.

All of these statutes are set out in the Appendix to this Petition.

## STATEMENT OF THE CASE

Five summonses were issued under the authority of the Secretary of the Treasury pursuant to 26 U.S.C. §7602 (I.R.C. §7602), for the production of the records pertaining to petitioner's accounts to the Manufacturers Hanover Trust Company, E.F. Hutton, & Co., Inc. and the Seamens Bank for Savings.

In each case, the taxpayer, Mr. Diem, was notified of the issuance of the summonses. Exercising the right given taxpayers by 26 U.S.C. §7609 (I.R.C. §7609) Mr. Diem intervened and stayed compliance with the summonses.

The Government thereupon instituted five separate proceedings with respect to each summons by order to show cause returnable simultaneously in the District Court. All the petitions were substantially similar in context. Each petition was supported by an affidavit of Internal Revenue Service Special Agent, Robert E. Ross.



In answer to each petition, the taxpayer cross-moved for a hearing and for discovery in aid of the hearing, alleging that the summonses were not issued in good faith but solely in aid of a criminal investigation and therefore should be suppressed.

The claim of the taxpayer was based upon the following allegations:

1. Mr. Affatato, the attorney for the taxpayer had advised the special agent that the taxpayer would voluntarily turn over the records if, in fact, the purpose was confined to ascertaining civil tax liability. In response to the offer made by the attorney, the special agent advised that he, the special agent, "is not interested in any civil proceeding and that his sole purpose in conducting the investigation is to determine if a criminal tax fraud was perpetrated by your deponent (taxpayer)."

2. Mr. Affatato, the attorney for the taxpayer, also diligently sought to reach agreement with the Internal Revenue Service on the production of documents. Failing that, on February 13, 1978, the taxpayer's attorney, by letter pursuant to the Privacy Act, requested inspection of all files and records of the Internal Revenue Service pertaining to Mr. Diem. At the time of the argument of the motion in the District Court, no response was received.

3. The summonses were overbroad. Some of the records required to be produced would not serve any legitimate purpose in determining civil tax liability. In addition, some of the summonses required records over a seven year period, although the special agent stated he was checking the taxpayer's returns for only four years.

In reply, the Government submitted an affidavit of Special Agent Ross, wherein he stated, "that my role in conducting this investigation related to a decision whether or not to recommend criminal prosecution. However, as I have made clear to counsel

for the taxpayer, the investigation, while criminal in nature may result in a criminal prosecution or the pursuit of civil remedies, or both."

Special Agent Ross did not deny the statement in the taxpayer's papers that he, Mr. Ross, had stated to Mr. Affatato, the attorney for the taxpayer, that his sole purpose was to determine whether a criminal tax fraud was perpetrated by the taxpayer. The affidavit of Mr. Ross went on to state that as of the date of his affidavit, March 3, 1978, there had been no determination as to whether there exists unreported income or whether to assert a deficiency claim for taxes or civil fraud penalties and that he had not made any determination whether to recommend criminal prosecution of the taxpayer.

After argument, and without an evidentiary hearing, District Court Judge Pierce granted the Government's motions without opinion and denied the taxpayer's cross-motion.

Jurisdiction in the District Court was based on 26 U.S.C. §7402(b) [I.R.C. §7402(b)] and 26 U.S.C. §7604(2) [I.R.C. §7604(2)].

The taxpayer appealed to the Court of Appeals and moved for a stay in the Court of Appeals, pending the disposition of the appeal. The Government cross-moved for summary affirmance of the appeal. The Court denied the taxpayer's motion and granted the Government's cross-motion in open court without opinion based on its own decision in *United States v. Morgan Guaranty Trust Co.*, 77-6191 2d Cir., February 6, 1978.

Petitioner was granted a stay of enforcement of the judgment of the Court of Appeals by Mr. Justice Marshall, on May 5, 1978, "pending the issuance of this Court's opinion in *United States v. La Salle National Bank*, Docket No. 77-365, argued March 29, 1978."

## REASONS FOR GRANTING THE WRIT

FIRST: The Internal Revenue Service may not issue a summons solely in aid of a criminal investigation. The decision of the Court of Appeals for the Second Circuit in this case and in *United States v. Morgan Guaranty Trust Co.*, is diametrically opposed to the decision of the Seventh Circuit Court of Appeals in *United States v. LaSalle National Bank*, 554 F.2d 302, argued on the merits in this Court on March 29, 1978. If the *LaSalle National Bank* case is decided in favor of the taxpayer, then this taxpayer will be entitled to suppress the summonses in this case and a reversal of the judgment appealed from.

SECOND: An added reason for granting certiorari in this case is to give guidance to the District Courts as to when and under what circumstances evidentiary hearings or discovery or both should be granted to taxpayers in this type of proceeding.

This case differs from the *LaSalle National Bank* case in the following respect.

In the *LaSalle* case, the District Court held an evidentiary hearing before it made its decision. It did not accept the special agent's affidavit at face value, as the District Court in this case did. Instead, in *LaSalle*, after hearing the special agent testify, the Court rejected his affidavit and his testimony and found that notwithstanding the Government's contention that there was an ongoing dual criminal and civil investigation, that in truth and in fact, the sole purpose was a criminal investigation.

In *United States v. Morgan Guaranty Trust Co.*, the Second Circuit Court of Appeals held and it again held in this case, that before there may be an evidentiary hearing, preceded by discovery, a taxpayer must show something more than was shown in the *Morgan Guaranty Trust Co.* and in this case.

The affidavit of Special Agent Ross is couched in conclusory, stereotyped, canned language which is just too pat to warrant credibility.

Even if the affidavit is not read as critically as we read it, it is clear that the primary stated purpose of the investigation is criminal prosecution and not civil enforcement of the tax laws. The language in the affidavit referring to enforcement of civil liability for taxes is merely a colorable attempt to comply with the decisional law on the subject to sustain the summonses.

Here, as is set forth under the Statement of the Case, the taxpayer made a sufficient showing to warrant either an evidentiary hearing or discovery in aid of the hearing, or both. Summary judgment motions in ordinary lawsuits are denied even when there is doubt as to whether or not there exists a triable issue or where the issue is arguable. And discovery and disclosure may be had to defend the motion when facts essential to justify opposition may exist but cannot then be stated because they are peculiarly within the knowledge of the adverse party (IRS). Cf., Federal Rules of Civil Procedure, Section 56(f); New York Civil Practice Law and Rules, Section 3212(f).

We fail to see why this same reasoning should not be applied in an I.R.C. Section 7602 proceeding to enforce a summons which is after all similar to a motion for summary judgment in an ordinary lawsuit.

**CONCLUSION**

The petition for certiorari should be granted.

Dated: May 22, 1978

Respectfully submitted,

s/ Isadore B. Hurwitz  
*Attorney for Petitioner*

Isadore B. Hurwitz  
Dominick Affatato  
*Of Counsel*

**APPENDIX I — JUDGMENT OF COURT OF APPEALS  
DATED APRIL 25, 1978**

UNITED STATES COURT OF APPEALS

Second Circuit

78-6048

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of April, one thousand nine hundred and seventy-eight.

UNITED STATES OF AMERICA and ROBERT E. ROSS of  
the Internal Revenue Service,

Petitioners-Appellee,

v.

MANUFACTURERS HANOVER TRUST COMPANY, et al.,

Respondent.

(Filed April 25, 1978)

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated April 20, 1978 for summary affirmance be and it hereby is granted.

A. DANIEL FUSARO,  
Clerk

s/ Edward Guardero

Staff Attorney



2a

HON. J. EDWARD LUMBARD  
HON. WILLIAM H. MULLIGAN  
HON. WILLIAM H. TIMBERS  
Circuit Judges

**APPENDIX II — ORDER OF MR. JUSTICE MARSHALL  
STAYING ENFORCEMENT OF JUDGMENT OF COURT  
OF APPEALS MAY 5, 1978**

SUPREME COURT OF THE UNITED STATES

No. A-921

MICHAEL R. DIEM,

Petitioner,

v.

UNITED STATES

**O R D E R**

UPON CONSIDERATION of the application for a stay filed by counsel for the petitioner, and the Solicitor General having indicated the United States is not opposed to a limited stay,

IT IS ORDERED that enforcement of the judgment of the United States Court of Appeals for the Second Circuit in case No. 78-6048 be, and the same is hereby, stayed pending the issuance of this Court's opinion in *United States v. LaSalle National Bank*, docket No. 77-365, argued March 29, 1978.

s/ Thurgood Marshall  
Associate Justice of the Supreme  
Court of the United States

3a

Dated this 5th

day of May, 1978

A true copy MICHAEL RODAK, JR.

Test:

Clerk of the Supreme Court of the United States

s/ Francis J. Gordon

Deputy

**APPENDIX III — INTERNAL REVENUE CODE**

**United States Code Annotated, Title 26**

**§7402. Jurisdiction of district courts**

“(a) To issue orders, processes, and judgments. — The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) To enforce summons. — If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance,



testimony, or production of books, papers, or other data."

#### **§7602. Examination of books and witnesses**

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

#### **§7604. Enforcement of summons**

"(a) Jurisdiction of district court. — If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement. — Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

**§7609. Special procedures for third-party summonses**

“(a) Notice. —

(1) In general. — If —

(A) any summons described in subsection (c) is served on any person who is a third-party recordkeeper, and

(B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons,

then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 14th day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain directions for staying compliance with the summons under subsection (b)(2).

(2) Sufficiency of notice. — Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if

mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) Third-party recordkeeper defined. — For purposes of this subsection, the term ‘third-party recordkeeper’ means —

(A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A));

(B) any consumer reporting agency (as defined under section 603(d) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)));

(C) any person extending credit through the use of credit cards or similar devices;

(D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)));

(E) any attorney; and

(F) any accountant.

(b) Right to intervene; right to stay compliance.

(1) Intervention. — Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Right to stay compliance. — Notwithstanding any law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to stay compliance with the summons if, not later than the 14th day after the day such notice is given in the manner provided in subsection (a)(2) —

(A) notice in writing is given to the person summoned not to comply with the summons, and

(B) a copy of such notice not to comply with the summons is mailed by registered or certified mail to such person and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

(c) Summons to which section applies. —

(1) In general. — Except as provided in paragraph (2), a summons is described in this subsection if it is issued under paragraph (2) of section 7602 or under section 6420(e)(2),

6421(f)(2), 6424(d)(2), or 6427(e)(2) and requires the production of records.

\* \* \*

(3) Records; certain related testimony. — For purposes of this section —

(A) the term 'records' includes books, papers, or other data, and

(B) a summons requiring the giving of testimony relating to records shall be treated as a summons requiring the production of such records.

(d) Restriction on examination of records. — No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made —

(1) before the expiration of the 14-day period allowed for the notice not to comply under subsection (b)(2), or

(2) when the requirements of subsection (b)(2) have been met, except in accordance with an order issued by a court of competent jurisdiction authorizing examination of such records or with the consent of the person staying compliance".



# APPENDIX IV — FEDERAL RULES OF CIVIL PROCEDURE

## Rule 56. Summary Judgment

\* \* \*

“(f) WHEN AFFIDAVITS ARE  
UNAVAILABLE.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.”

# APPENDIX V — NEW YORK CIVIL PRACTICE LAW AND RULES

## Rule 3212. Motion for Summary Judgment

\* \* \*

“(f) FACTS UNAVAILABLE TO OPPOSING  
PARTY.

Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.”